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DRAFT ARTICLES FOR A CONVENTION ON ARREST OF SHIPS

Note by the secretariat of UNCTAD

The attached document* has been prepared at the request of the ninth session of the Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects.

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Joint Intergovernmental
Group of Experts on Maritime Liens
and Mortgages and Related Subjects

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Note by the secretariats of UNCTAD and IMO

INTRODUCTION

The Joint Intergovernmental Group of Experts on Maritime Liens and Mortgages and Related Subjects, at its ninth session, completed consideration of the draft articles for a convention on arrest of ships, as contained in document JIGE(IX)/2, TD/B/IGE.1/2, LEG/MLM/39. It therefore requested the secretariats of UNCTAD and IMO, in consultation with the Chairman of the Joint Group, to prepare a revised set of draft articles on the basis of the decisions taken by the Group (see the report of the Joint Group at its ninth session, JIGE(IX)/4, TD/B/IGE.1/4, LEG/MLM/41, paragraph 9).

The Joint Group also recommended "to the International Maritime Organization (IMO) Council and to the Trade and Development Board of UNCTAD that they consider favourably, on the basis of the useful work done so far, proposing to the General Assembly of the United Nations the convening of a diplomatic conference to consider and adopt a convention on certain rules relating to the arrest of sea-going ships on the basis of the draft articles prepared by the Group of Experts" (see the report of the Joint Group at its ninth session, annex I).

This document has been prepared, in consultation with the Chairman of the Joint Group, in response to the above request. It is to serve as the basis for the work of a possible diplomatic conference convened by the General Assembly of the United Nations. The document contains two parts. Part A includes revised draft articles for a convention on arrest of ships, and part B contains draft final clauses prepared by the secretariats on the basis of the final provisions of the 1993 International Convention on Maritime Liens and Mortgages (1993 MLM Convention).

Part A

DRAFT ARTICLES FOR A CONVENTION ON ARREST OF SHIPS

Article 1 - Definitions

(1) "Maritime claim" means any [claim concerning or arising out of the ownership, construction, possession, management, operation or trading of any ship, or concerning or arising out of a mortgage or an "hypothèque" or a registrable charge of the same nature on any ship, such as any][1] claim in respect of:

(a) loss or damage caused by the operation of the ship;

(b) loss of life or personal injury occurring, whether on land or on water, in direct connection with the operation of the ship;

(c) salvage operations or any salvage agreement;

(d) the removal or attempted removal of a threat of damage including damage to the environment or of preventive measures or similar operations, whether or not arising under any

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[1]. Opinions were divided within the Joint Group as to whether article 1(1) should adopt a similar approach to that of the 1952 Convention and provide an exhaustive list of maritime claims, or whether it should adopt a more flexible approach of retaining an open-ended list. The question was therefore left to be decided at a later stage by a diplomatic conference. See the report of the Joint Group at its ninth session (JIGE(IX)/4, TD/B/IGE.1/4, LEG/MLM/41), annex II, paragraphs 2-3.

. Article 1(1) was amended by the Informal Working Group set up during the eighth session of the Joint Group to ensure that all claims granted maritime lien status under the 1993 International Convention on Maritime Liens and Mortgages are included without creating duplication or inconsistency within various subparagraphs.

Subparagraph (a) has been amended to avoid inconsistency with sub-paragraph (h). Subparagraphs (d) and (p) have been redrafted. The word "construction" in original subparagraph (m)has been replaced by "building" and the term "charges" has been used in subparagraph (n)in place of "pilotage dues". Subparagraphs (s) and (v) had been merged by the Informal Working Group. They are, however, kept separate because of the cross-reference made in article 4(1) to article 1(1)(s), as pointed out in the Sessional Group. The word "registered" has been added before "mortgage" and "hypothèque". For discussions on article 1(1), see the report of the Informal Working Group (annex III of the report of the Joint Group) and the report on the work of the Sessional Group (annex II, paragraphs 2-14).

international convention, or any enactment or agreement, or losses incurred, or likely to be incurred, by third parties;

(e) costs or expenses relating to the raising, removal, recovery or destruction of the wreck of the ship or its cargo;

(f) any agreement relating to the use or hire of the ship, whether contained in a charter party or otherwise;

(g) any agreement relating to the carriage of goods or passengers in the ship, whether contained in a charter party or otherwise;

(h) loss of or damage to or in connection with goods (including luggage) carried in the ship;

(i) general average;

(j) towage;

(k) pilotage;

(l) goods, materials, provisions, bunkers, equipment (including containers) or services supplied to the ship for its operation or maintenance;

(m) building, repairing, converting or equipping of the ship;

(n) port, canal, and other waterway dues and charges;

(o) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf;

(p) master's disbursements and disbursments made by shippers, demise charterers, other charterers or agents on behalf of the ship or its owners;

(q) insurance premiums (including mutual insurance calls) in respect of the ship, payable by or on behalf of the shipowner or demise charterer;

(r) any commissions, brokerages or agency fees payable in respect of the ship by or on behalf of the shipowner or demise charterer;

(s) any dispute as to ownership or possession of the ship;

(t) any dispute between co-owners of the ship as to the employment or earnings of the ship;

(u) a registered mortgage or a registered "hypothèque" or a registrable charge of the same nature on the ship;

(v) any dispute arising out of a contract for the sale of the ship.

(2) "Arrest" means any detention or restriction on removal of a ship as a conservatory measure by order of a Court to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgement, arbitral award or other enforceable instrument.[3]

(3) "Person" means any individual or partnerships or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions.

(4) "Claimant" means any person asserting a maritime claim.

(5) "Court" means any competent judicial authority of a State.

Article 2 - Powers of arrest

(1) A ship may be arrested or released from arrest only by or under the authority of a Court of the Contracting State in which the arrest is made.

(2) A ship may only be arrested in respect of a maritime claim but in respect of no other claim.

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[3]. Article 1(2) was redrafted at the ninth session of the Joint Group. It was, however, felt that in view of its importance, it might need further consideration. See the report of the Joint Group at its ninth session, annex II, paras. 16-22.

[(3) A ship may be arrested even though it is ready to sail or is sailing.][4]

(4) A ship may be arrested for the purpose of obtaining security notwithstanding that, by virtue of a jurisdiction clause or arbitration clause in any relevant contract, or otherwise, the maritime claim in respect of which the arrest is made is to be adjudicated in a State other than the State where the arrest is made, or is to be arbitrated, or is to be adjudicated subject to the law of another State.

(5) Subject to the provisions of this Convention, the procedure relating to the arrest of a ship or its release shall be governed by the law of the State in which the arrest was made or applied for.

Article 3 - Exercise of right of arrest

(1) Arrest is permissible of any ship in respect of which a maritime claim is asserted if:[5]

(a) the claim against the owner, demise charterer, manager or operator of the ship is secured by a maritime lien and is within any of the following categories:

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[4]. Article 2(3) was placed in brackets at the ninth session of the Joint Group. See the report of the Joint Group at its ninth session, annex II, paras. 32-38.

[5]. Article 3 was subject to extensive discussions within the Joint Group. The text of the article was amended at the ninth session on the basis of the proposal put forward by the delegation of the United States of America and proposals of other delegations. The words "claims against the owner, demise charterer, manager or operator of the ship" have been included in paragraphs 1(a) and (b); subparagraph (b) dealing with the right of arrest in respect of national maritime liens is placed in brackets. The words "a mortgage, or an 'hypothèque' or registrable charge of the same nature" are used in paragraph 1(c). It was however felt that the use of the term "registrable" in this context should be further considered. Paragraphs 1(e)(ii) and 2(b), dealing with the right of arrest for claims not secured by a maritime lien for which the demise charterer and time charterer were personally liable, are placed in brackets. The concept of claims based on tort is introduced in paragraph 1(a)(v) in the same way as in article 4 of the 1993 MLM Convention. For discussions on article 3, see the report of the Joint Group at its ninth session, annex II, paras. 50-65.

(i) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship, including costs of repatriation and social insurance contributions payable on their behalf,

(ii) loss of life or personal injury occurring, whether on land of on water, in direct connection with the operation of the ship,

(iii) reward for the salvage of the ship,

(iv) port, canal, and other waterway dues and pilotage dues,

(v) physical loss or damage (based on tort) caused by the operation of the ship other than loss of or damage to cargo, containers and passengers' effects carried on the ship; or

(b) [the claim against the owner, demise charterer, manager or operator of the ship is secured by a maritime lien, other than those referred to in paragraph (a), recognized under the law of the State where the arrest is requested; or]

(c) the claim is based upon a mortgage or an "hypothèque" or a registrable charge of the same nature; or

(d) the claim is related to ownership or possession of the ship; or

(e) the claim is not covered by (a), (b) , (c) or (d) above and if:

(i) the person who owned the ship at the time when the maritime claim arose is personally liable for the claim and is owner of the ship when the arrest is effected [, or

(ii) the demise charterer of the ship is personally liable for the claim and is demise charterer or owner of the ship when the arrest is effected].

(2) Arrest is also permissible of any other ship or ships which, when the arrest is effected, is or are owned by the person who is personally liable for the maritime claim and who was, when the claim arose:

(a) owner of the ship in respect of which the maritime claim arose[; or

(b) demise charterer, time charterer or voyage charterer of that ship].

This provision does not apply to claims in respect of ownership or possession of a ship.

(3) Notwithstanding the provisions of paragraphs (1) and (2) of this article, the arrest of a ship which is not owned by the person allegedly liable for the claim shall be permissible only if, under the law of the State where the arrest is demanded, a judgement in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.

Article 4 - Release from arrest

(1) A ship which has been arrested shall be released when sufficient security has been furnished in a satisfactory form, save in cases in which a ship has been arrested in respect of any of the maritime claims enumerated in article 1(1)(s) and (t). In such cases, the court may permit the person in possession of the ship to continue trading the ship, upon such person furnishing sufficient security, or may otherwise deal with the operation of the ship during the period of the arrest.

(2) In the absence of agreement between the parties as to the sufficiency and form of the security, the Court shall determine its nature and the amount thereof [, not exceeding the value of the ship].[6]

(3) Any request for the ship to be released upon security being provided shall not be construed as an acknowledgement of liability nor as a waiver of any defence or any right to limit liability.

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[6]. Following comments made by some delegations concerning limiting the amount of the security to the value of the ship, the phrase "not exceeding the value of the ship" in paragraphs 2 and 4(b)(ii) is placed in brackets. See the report of the Joint Group at its ninth session, annex II, paras. 68-77.

(4) (a) If a ship has been arrested in a non-party State and is not released although security has been given in a State Party,[7] that security shall be ordered released on application to the Court in the State Party [save in exceptional cases where it would be unjust to do so].[8]

(b) If in a non-party State the ship is released upon satisfactory security being provided, any security given in a State Party shall be ordered released to the extent that the total amount of security given in the two States exceeds:

(i) the claim for which the ship has been arrested[, or

(ii) the value of the ship,

whichever is the lower].

Such release shall, however, not be ordered unless the security given in the non-party State will actually be available to the claimant and will be freely transferable.

(5) Where, pursuant to paragraph (1) of this article, security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified, or cancelled.

Article 5 - Right of rearrest and multiple arrest

(1) Where in any State a ship has already been arrested and released or security in respect of that ship has already been given to secure a maritime

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[7]. For the sake of clarity, consideration may be given to inserting the term "in respect of the same claim" after the words "a State Party" in paragraphs 4(a) and (b) of this article.

[8]. In view of the concerns expressed by some delegations concerning the vagueness of the term "unjust" and the limited application of the proviso in this subparagraph, the phrase "save in exceptional cases where it would be unjust to do so" was placed in brackets. See the report of the Joint Group at its 9th session, annex II, paras. 74-76.

claim, that ship shall not thereafter be rearrested or arrested in respect of the same maritime claim unless:

(a) the nature or amount of the security already obtained in respect of the same claim is inadequate, provided that the aggregate amount of security may not exceed the value of the ship;[9] or

(b) the person who has already given the security is not, or is unlikely to be, able to fulfil some or all of his obligations[; or

(c) the ship arrested or the security previously given was released either:

(i) upon the application or with the consent of the claimant acting on reasonable grounds, or

(ii) because the claimant could not by taking reasonable steps prevent the release].[10]

(2) Any other ship which would otherwise be subject to arrest in respect of the same maritime claim shall not be arrested unless:

(a) the nature or amount of the security already obtained in respect of the same claim is inadequate; or

(b) the provisions of paragraph (1)(b) or (c) of this article are applicable.

(3) "Release" for the purpose of this article shall not include any unlawful release or escape from arrest.

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[9]. If it is decided not to limit the amount of security to the value of the ship in article 4(2) and 4(b)(ii), for the sake of consistency the necessary drafting amendment should also be made in respect of the proviso of article 5(1)(a).

[10]. Paragraph 1(c) of article 5 had been placed in brackets at the seventh session of the Joint Group. For discussions on article 5, see the report of the Joint Group at its ninth session, annex II, paras. 79-83.

Article 6 - Protection of owners and demise charterers of arrested ships

(1) The court may as a condition of the arrest of a ship, or of permitting an arrest already effected to be maintained, impose upon the claimant who seeks to arrest or who has procured the arrest of the ship the obligation to provide security of a kind and for an amount, and upon such terms, as may be determined by that Court for any loss which may be incurred by the defendant as a result of the arrest, and for which the claimant may be found liable, including but not restricted to such loss or damage as may be incurred by that defendant in consequence of:

(a) the arrest having been wrongful [or unjustified];[11] or

(b) excessive security having been demanded and obtained.

(2) The Courts of the State in which an arrest has been effected shall have jurisdiction to determine the extent of the liability, if any, of the claimant for loss or damage caused by the arrest of a ship, including but not restricted to such loss or damage as may be caused in consequence of:

(a) the arrest having been wrongful [or unjustified], or

(b) excessive security having been demanded and obtained.

(3) The liability, if any, of the claimant in accordance with paragraph (2) of this article shall be determined by application of the law of the State where the arrest was effected.

(4) If a Court in another State or an arbitral tribunal is to determine the merits of the case in accordance with the provisions of article 7, then proceedings relating to the liability of the claimant in accordance with paragraph (2) of this article may be stayed pending that decision.

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[11]. The word "unjustified" in paragraphs 1(a) and 2(a) has been placed in brackets following a proposal from the delegation of the United Kingdom which was supported by some delegations. See the report of the Joint Group at its ninth session, annex II, paras. 84-87.

(5) Where pursuant to paragraph (1) of this article security has been provided, the person providing such security may at any time apply to the Court to have that security reduced, modified or cancelled.

Article 7 - Jurisdiction on the merits of the case

(1) The Courts of the State in which an arrest has been made or security given to prevent arrest or obtain the release of the ship shall have jurisdiction to determine the case upon its merits, unless the Parties validly agree or have agreed to submit the dispute to a Court of another State which accepts jurisdiction, or to arbitration.

(2) Notwithstanding the provisions of paragraph (1) of this article, the Courts of the State in which an arrest has been made, or security given to prevent arrest or obtain the release of the ship, may refuse to exercise that jurisdiction where that refusal is permitted by the law of that State and a Court of another State accepts jurisdiction.

(3) In cases where a Court of the State where an arrest has been made or security given to prevent arrest or obtain the release of the ship:

(a) does not have jurisdiction to determine the case upon its merits; or

(b) has refused to exercise jurisdiction in accordance with the provisions of paragraph (2) of this article,

such Court may, and upon request shall, order a period of time within which the claimant shall bring proceedings before a competent Court or arbitral tribunal.

(4) If proceedings are not brought within the period of time ordered in accordance with paragraph (3) of this article then the ship arrested or the security given shall, upon request, be ordered released.

(5) If proceedings are brought within the period of time ordered in accordance with paragraph (3) of this article, or if proceedings before a competent Court or arbitral tribunal in another State are brought in the absence of any such order, then unless such proceedings do not satisfy general requirements in respect of due process of law, any final decision resulting therefrom shall be recognized and given effect with respect to the

arrested ship or to the security given in order to prevent its arrest or obtain its release.

(6) Nothing contained in the provisions of paragraph (5) of this article shall restrict any further effect given to a foreign judgement or arbitral award under the law of the State where the arrest of the ship was made or security given to prevent its arrest or obtain its release.

Article 8 - Application

(1) This Convention shall apply to any seagoing ship within the jurisdiction of any State party, whether or not that ship is flying the flag of a State Party.[12]

(2) The Convention shall not apply to ships owned or operated by a State and used only on Government non-commercial service.

(3) Nothing in this Convention shall be construed as creating a maritime lien.[13]

(4) This Convention does not affect any rights or powers vested in any Government or its departments, or in any public authority, or in any dock or harbour authority, under any international convention or under any domestic law or regulation, to detain or otherwise prevent from sailing any ship within their jurisdiction.

(5) This Convention shall not affect the power of any State or Court to make orders affecting the totality of a debtor's assets.

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[12]. Article 8(1) was amended at the ninth session of the Joint Group by the inclusion of a requirment that the vessel be subject to the jurisdiction of a State Party. It was also proposed by some delegations that the words "where the order has been made" should be added after the phrase "jurisdiction of any State Party". See the report of the Joint Group at its ninth session, annex II, paras. 93-102.

[13]. It was proposed by one delegation that paragraph (3) of article 8 should either be an independent article or form part of article 3. The decision on the question was postponed to a later stage. See the report of the Joint Group at its ninth session, annex II, para. 105.

(6) Nothing in this Convention shall affect the application of international conventions providing for limitation of liability, or domestic law giving effect thereto, in the State where an arrest is effected.

(7) Nothing in this Convention shall modify or affect the rules of law in force in the States Parties relating to the arrest of any ship physically within the jurisdiction of the State of its flag procured by a person who has his habitual residence or principal place of business in that State, or by any other person who has acquired a claim from such person by subrogation, assignment or otherwise.

Article 9 - Reservations

A State may, when signing, ratifying, accepting or acceding to this Convention, reserve the right to refrain from applying the Convention to ships not flying the flag of a State Party.

Part B

DRAFT FINAL CLAUSES

Article A

Signature, ratification, acceptance, approval and accession

1. This Convention shall be open for signature by any State at ....., from ....., to ..... and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Convention by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or

(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with.....

Article B

Entry into force

1. This Convention shall enter into force ..... following the date on which ... States have expressed their consent to be bound by it.

2. For a State which expresses its consent to be bound by this Convention after the conditions for entry into force thereof have been met, such consent shall take effect ..... after the date of expression of such consent.

Article C

Denunciation

1. This Convention may be denounced by any State Party at any time after the expiry of ..... from the date on which this Convention enters into force for that State.

2. Denunciation shall be effected by deposit of an instrument of denunciation with ...

3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the receipt of the instrument of denunciation by .....

Article D

Revision and amendment

1. A conference of States Parties for the purpose of revising or amending this Convention shall be convened by ..... at the request of one-third of the States Parties.

2. Any consent to be bound by this Convention, expressed after the date of entry into force of an amendment to this Convention, shall be deemed to apply to the Convention, as amended.

Article E

National laws

Each State Party shall communicate to the depositary the texts of any legislative and other measures promulgated in order to implement this Convention.

Article F

Depositary

1. This Convention shall be deposited with .....

1. The depositary shall:

(a) inform all States which have signed this Convention or acceded thereto, and all Members of the Organization, of:

(i) each new signature or deposit of expression of consent to be bound by this Convention together with the date thereof;

(ii) the date of the entry into force of this Convention;

(iii) the deposit of any instrument of denunciation of this Convention together with the date on which it is received and the date on which the denunciation takes effect;

(iv) the receipt of any reservation, declaration or notification made under this Convention;

(v) the receipt of any texts communicated in accordance with article E;

(b) transmit certified true copies of this Convention to all States which have signed this Convention or acceded thereto.

Article G

Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT ..... this ....., one thousand nine hundred and ninety-.....

IN WITNESS WHEREOF the undersigned being duly authorized by their respective Governments for that purpose have signed this Convention.